

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Martell B. Bland,

Plaintiff,

V.

United States Marshals Service, et al.,

Defendants.

Case No. 2:22-cv-00886-JAD-DJA

Order & **Report and Recommendation**

Plaintiff, an inmate at the Nevada Southern Detention Center, is proceeding in this action *pro se*, and has requested authority to proceed *in forma pauperis* under 28 U.S.C. § 1915. (ECF No. 9). Plaintiff also submitted a complaint. (ECF No. 1-1). Because the Court finds that Plaintiff's application to proceed *in forma pauperis* is complete, it grants his application. Because the Court finds that Plaintiff's claims are not authorized under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) and lack sufficient factual detail, it recommends dismissing Plaintiff's complaint.

I. *In forma pauperis* application.

Plaintiff filed the affidavit required by 28 U.S.C. § 1915(a). (ECF No. 9). Plaintiff has shown an inability to prepay fees and costs or give security for them. Accordingly, the request to proceed *in forma pauperis* will be granted under 28 U.S.C. § 1915(a). The Court will now review Plaintiff's complaint.

II. Screening the complaint.

Upon granting an application to proceed *in forma pauperis*, courts additionally screen the complaint under § 1915(e). Federal courts are given the authority to dismiss a case if the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). When a court dismisses a complaint under § 1915, the plaintiff should be given leave to amend

1 the complaint with directions as to curing its deficiencies, unless it is clear from the face of the
2 complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70
3 F.3d 1103, 1106 (9th Cir. 1995).

4 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a
5 complaint for failure to state a claim upon which relief can be granted. Review under Rule
6 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d
7 719, 723 (9th Cir. 2000). A properly pled complaint must provide a short and plain statement of
8 the claim showing that the pleader is entitled to relief. Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v.*
9 *Twombly*, 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed factual
10 allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the
11 elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Papasan v.*
12 *Allain*, 478 U.S. 265, 286 (1986)). The court must accept as true all well-pled factual allegations
13 contained in the complaint, but the same requirement does not apply to legal conclusions. *Iqbal*,
14 556 U.S. at 679. Mere recitals of the elements of a cause of action, supported only by conclusory
15 allegations, do not suffice. *Id.* at 678. Secondly, where the claims in the complaint have not
16 crossed the line from conceivable to plausible, the complaint should be dismissed. *Twombly*, 550
17 U.S. at 570. Allegations of a *pro se* complaint are held to less stringent standards than formal
18 pleadings drafted by lawyers. *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (finding
19 that liberal construction of *pro se* pleadings is required after *Twombly* and *Iqbal*).

20 Federal courts are courts of limited jurisdiction and possess only that power authorized by
21 the Constitution and statute. *See Rasul v. Bush*, 542 U.S. 466, 489 (2004). Under 28 U.S.C.
22 § 1331, federal courts have original jurisdiction over “all civil actions arising under the
23 Constitution, laws, or treaties of the United States.” Cases “arise under” federal law either when
24 federal law creates the cause of action or where the vindication of a right under state law
25 necessarily turns on the construction of federal law. *Republican Party of Guam v. Gutierrez*, 277
26 F.3d 1086, 1088-89 (9th Cir. 2002). Whether federal-question jurisdiction exists is based on the
27 “well-pleaded complaint rule,” which provides that “federal jurisdiction exists only when a
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1 federal question is presented on the face of the plaintiff's properly pleaded complaint."

2 *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987).

3 **A. Background.**

4 Plaintiff sues the United States Marshals Service ("USMS"); Correction Corporation of
5 America ("CCA"); CoreCivic, Inc.; CEO of CoreCivic Damon T. Hininger; Marshal Theo
6 Anderson; Nevada Southern Detention Center ("NSDC"); NSDC Health Service Administrator
7 A. Thornton; NSDC Medical Provider J. Peterson; and NSDC Nurse Mr. Silva. (ECF No. 1-1 at
8 1-3). Plaintiff alleges that on March 6, 2021, a sharp pain woke him up and his sister took him to
9 the hospital. (*Id.* at 4). At the hospital, a doctor diagnosed Plaintiff with three slipped discs.
10 (*Id.*). Plaintiff describes that between March 6, 2021 and March 11, 2021, he underwent
11 procedures to address his slipped discs. (*Id.* at 4-5).

12 Plaintiff was scheduled to undergo surgery to address the issues resulting from his slipped
13 discs on November 19, 2021. (*Id.* at 5). He alleges that the USMS deprived him of that surgery,
14 but he does not explain how. (*Id.*). Plaintiff asserts that he also informed the USMS that he had
15 recently been shot in his right arm. (*Id.*). Plaintiff alleges that, despite needing surgery and the
16 bullet wound causing his arm to swell, he "was not given" any medication to address the pain or
17 treatment to address the injury. (*Id.*).

18 Plaintiff alleges that he "was allowed" to have his back surgery on March 17, 2022. (*Id.*
19 at 6). However, he "was told" he would be deprived of necessary therapy following the surgery.
20 (*Id.*). After surgery, Plaintiff "was transported" to a room in the prison infirmary where he "was
21 placed" on a mat on the floor, which exacerbated his pain. (*Id.*). Plaintiff was bleeding from the
22 surgery, but "was left unassisted" for five days without any treatment. (*Id.*). Plaintiff "was later
23 given" a walker and "put into" general population, which he asserts placed his life in danger.
24 (*Id.*). Plaintiff "was then provided" with 300 mg of ibuprofen, which he asserts was insufficient
25 to address his pain. (*Id.*). Plaintiff asserts that the nurses and medical staff NSDC ignored his
26 requests for help. (*Id.*).

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1 ***B. Plaintiff's claims arise under Bivens.***

2 Although the complaint states that this is a 42 U.S.C. § 1983 action, that statute only
 3 works for claims against state actors, which these defendants are not. The Court thus liberally
 4 construes this action as one under § 1983's federal corollary—the case of *Bivens v. Six Unknown
 5 Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In doing so, the Court finds
 6 that Plaintiff has not pled a colorable claim.

7 ***C. Claims against CoreCivic/CCA/NSDC.***

8 Plaintiff alleges that CoreCivic¹ contracts with the Department of Justice and the USMS
 9 to house federal inmates. (ECF No. 1-1 at 2). As a private entity and not a governmental entity,
 10 CoreCivic may not be held liable in a *Bivens* action. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61,
 11 66 (2001) (holding that *Bivens* does not extend to private entities acting under color of federal
 12 law). The Court thus recommends dismissal of Plaintiff's claims against CoreCivic without leave
 13 to amend.

14 ***D. Claims against CoreCivic medical personnel and its CEO.***

15 Plaintiff alleges that CoreCivic medical personnel—Thornton, Peterson, and Silva—
 16 deprived him of proper medical care after his surgery. Plaintiff also alleges that the CEO of
 17 CoreCivic—Hininger—failed to ensure that inmates received adequate medical care. Plaintiff
 18 brings his claims under the Fifth Amendment Due Process Clause and the Eighth Amendment for
 19 deliberate indifference to serious medical needs. Because Plaintiff's claims are not authorized
 20 under *Bivens* and because the availability of alternative remedies preclude his *Bivens* claims, the
 21 Court recommends dismissing them with prejudice.

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23 ¹ Corrections Corporation of America rebranded to CoreCivic in 2016. See *Corrections
 24 Corporation of America Rebrands as CoreCivic*, CORECIVIC (October 28, 2016),
<https://www.corecivic.com/news/corrections-corporation-of-america-rebrands-as-corecivic>. The
 25 Court thus treats CCA and CoreCivic as the same defendant. Plaintiff also alleges that NSDC
 26 “[i]s a Federal Detention Center that houses Federal Inmates...and is “a subsidiary of the Federal
 27 Government and CoreCivic Inc...” (ECF No. 1-1 at 3). To the extent Plaintiff attempts to sue
 28 the detention center itself, he cannot do so because it is a building and therefore not subject to suit
 and liability. *Johnson v. CoreCivic*, No. 2:20-cv-01309-JAD-VCF, 2021 WL 4954302, at *2 n.18
 (D. Nev. Oct. 25, 2021).

1 As a preliminary matter, even if *Bivens* did authorize Plaintiff's claims, he has not alleged
2 sufficient facts about each individual defendant's involvement in depriving him medical care to
3 constitute a colorable claim against them. Even though Plaintiff states that NSDC medical staff
4 ignored his pleas for help, he does not identify what actions each particular defendant took. And
5 Plaintiff's allegations that he "was told" he would not receive therapy, "was placed" on a mat on
6 the floor, "was left" unassisted, "was given" a walker, was "put into" general population, and
7 "was then provided" with ibuprofen do not identify any particular defendant. Plaintiff alleges
8 even less against Hininger, the CEO of CoreCivic. Plaintiff only alleges that Hininger failed to
9 "ensur[e] that all inmates and detainees are provided with adequate medical care." (ECF No. 1-
10 1). But alleging that a defendant held a particular position or that the defendant's subordinate, co-
11 workers, or some other person associated with the defendant violated the plaintiff's civil rights is
12 insufficient to state a colorable claim against the defendant. *Iqbal*, 556 U.S. at 676 (holding that
13 "[b]ecause vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that
14 each Government-official defendant, through the official's own individual actions, has violated
15 the Constitution.").

16 Even if Plaintiff had alleged each of the CoreCivic defendants' involvement in depriving
17 him medical care, his claims would still fail because they are not authorized under *Bivens*.
18 Plaintiff alleges that he is a pretrial detainee. However, he invokes both the Fifth and Eighth
19 Amendment. As a pretrial detainee, Plaintiff's claims arise under the Due Process Clause of the
20 Fifth Amendment. If he was serving a sentence, his claims would arise under the Eighth
21 Amendment. *See Bell v. Wolfish*, 441 US. 520, 535 n.16 (1979) (noting that "the Due Process
22 Clause [of the Fifth Amendment] rather than the Eighth Amendment" is applicable to claims of
23 pre-trial detainees because "Eighth Amendment scrutiny is appropriate only after the State has
24 complied with the constitutional guarantees traditionally associated with criminal prosecutions.").
25 Because Plaintiff invokes both the Fifth Amendment and the Eighth Amendment, the Court
26 addresses both. In either event, *Bivens* does not authorize his claims and alternative remedies
27 preclude them.

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1 1. Bivens analysis.

2 In *Bivens*, the United States Supreme Court held that, even absent statutory authorization,
3 it would enforce a damages remedy to compensate persons injured by federal officers who
4 violated the prohibition against unreasonable searches and seizures. *See Bivens*, 403 U.S. at 397.
5 The High Court later expanded *Bivens* damages claims in specific gender-discrimination and
6 inadequate-medical-treatment scenarios involving defendants who were federal employees. *See*
7 *Davis v. Passman*, 442 U.S. 228, 248–49 (1979) (permitting a damages remedy for gender
8 discrimination under the Fifth Amendment Due Process Clause); *Carlson v. Green*, 446 U.S. 14,
9 19 (1980) (allowing a damages remedy for an Eighth Amendment violation for failure to provide
10 adequate medical treatment); *see also Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) (“A *Bivens*
11 claim may arise in a new context even if it is based on the same constitutional provision as a
12 claim in a case in which a damages remedy was previously recognized.”). Then in *Ziglar v.*
13 *Abbas*, the Court significantly limited the availability of *Bivens* actions, cautioning lower courts
14 not to expand *Bivens* remedies outside those specific three scenarios’ very specific contexts
15 without special circumstances. *Ziglar v. Abbas*, 137 S. Ct. 1843, 1854–55, 1857–61 (2017)
16 (explaining that a context is new if the case differs in any meaningful way from the three previous
17 *Bivens* cases); *Minneci v. Pollard*, 565 U.S. 118, 126 (2012) (recognizing that defendant’s status
18 as private employee is a new context).

19 When a *Bivens* action is brought in a context different from the three recognized
20 scenarios, as is the situation in Plaintiff’s case, the availability of alternative remedies will
21 generally preclude the *Bivens* claim. *Ziglar*, 137 S. Ct. at 1858, 1864–65; *Vega v. United States*,
22 881 F.3d 1146, 1153–55 (9th Cir. 2018) (declining to extend *Bivens* to Fifth Amendment due-
23 process claim). The alternative remedies and a potential *Bivens* remedy “need not be perfectly
24 congruent.” *Minneci*, 565 U.S. at 129; *see also Vega*, 881 F.3d at 1155 (recognizing that the
25 alternative remedial structure and the potential *Bivens* remedy need not be identical, and “any
26 alternative, existing process for protecting the interest amounts to a convincing reason for the
27 Judicial Branch to refrain from a new and freestanding remedy in damages”). *Bivens* does not
28 extend to new situations if there is an alternative remedial structure like tort law, injunction

1 actions, or remedial mechanisms established by the Bureau of Prisons (“BOP”) for review of a
2 federal prisoner’s conditions-of-confinement issues. *See Minneci*, 565 U.S. at 131 (holding that
3 *Bivens* claim may not be brought against employees working at a privately operated federal
4 prison where the allegedly wrongful conduct is of a kind that typically falls within the scope of
5 traditional state tort law); *Malesko*, 534 U.S. at 74 (declining to apply *Bivens* where inmate in
6 privately operated prison had full access to the remedial mechanisms established by the BOP,
7 including suits in federal court for injunctive relief and grievances filed through the BOP’s
8 Administrative Remedy Program as set forth in 28 C.F.R. § 542.10); *Vega*, 881 F.3d at 1148
9 (holding that *Bivens* did not apply to Fifth Amendment due process claim because plaintiff had
10 alternative means for relief against private entity’s employees through 28 C.F.R. § 542.10). This
11 is true even if that alternative remedy is less generous than one available under *Bivens* or the
12 plaintiff’s claims for those remedies may ultimately fail. *Vega*, 881 F.3d at 1155.

13 2. Eighth Amendment deliberate indifference claims.

14 To the extent that Plaintiff brings Eighth Amendment claims for deliberate indifference to
15 serious medical needs against the CoreCivic employees based on a failure to provide medical care
16 for him after his surgery, the Court recommends dismissing them. Plaintiff’s Eighth Amendment
17 claims do not fall into one of the three categories for which *Bivens* claims are authorized, both
18 because the claims raise issues about deliberate indifference to serious medical needs and because
19 they target employees of a privately operated prison. *See Bacon v. CoreCivic*, No. 2:20-cv-
20 00914-JAD-VCF, 2021 WL 6200603, at *5 (D. Nev. Mar. 9, 2021) (“[a]n Eighth Amendment
21 claim for deliberate indifference to serious medical needs brought against private prison
22 employees is a new context.”). The Court must thus consider whether *Bivens* remedies should be
23 extended to this situation. The Supreme Court has held that if a federal prisoner seeks damages
24 from defendants who are employed by an entity privately operating a federal prison, where “the
25 conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of
26 a kind that typically falls within the scope of traditional state tort law (such as the conduct
27 involving improper medical care at issue here), the prisoner must seek a remedy under state tort
28 law” and the Court cannot imply a *Bivens* remedy. *Minneci*, 565 U.S. at 131. Plaintiff may not

1 pursue his Eighth Amendment claims for deliberate indifference to serious medical needs against
 2 the CoreCivic employees and the Court recommends dismissing them without leave to amend.

3. **Fifth Amendment due process claims.**

4 Plaintiff's Fifth Amendment claims also do not fall into one of the three categories for
 5 which *Bivens* claims are authorized, again both because the claims raise issues about deprivation
 6 of adequate medical care and because they target employees of a privately operated prison. And
 7 for the same reasons the Court cannot imply a *Bivens* remedy for Plaintiff's Eighth Amendment
 8 claims, it cannot imply a remedy for his Fifth Amendment claims. Plaintiff's Fifth Amendment
 9 due process claims stem from the same conduct underlying his Eighth Amendment claims and are
 10 also lodged against privately employed defendants. And that conduct is "of a kind that typically
 11 falls within the scope of traditional state tort law." *Minneci*, 565 U.S. at 131. Plaintiff may not
 12 pursue his Fifth Amendment due process claims against the CoreCivic employees and the Court
 13 recommends dismissing them without leave to amend.

14 ***E. Claims against the USMS.***

15 Plaintiff alleges that the USMS deprived him of his back surgery and did not provide him
 16 treatment for his bullet wound. (ECF No. 1-1 at 5-6). However, a *Bivens* claim may only be
 17 maintained against officials acting under color of federal law in their individual capacities—
 18 neither the United States nor a federal agency is a proper defendant for *Bivens* claims. *See FDIC*
v. Meyer, 510 U.S. 471, 486 (1994) (federal agencies are not proper defendants in a *Bivens*
 19 action); *Myers v. U.S. Marshals Serv.*, No. 10-cv-02662, 2011 WL 671998, at *2 (S.D. Cal. Feb.
 21 15, 2011) (dismissing United States Marshals Service because *Bivens* does not authorize suits
 22 against federal agencies). The Court thus recommends dismissing Plaintiff's claims against the
 23 USMS without leave to amend.

24 ***F. Claims against Marshal Anderson.***

25 Marshal Anderson is the only federal official Plaintiff names. Plaintiff alleges that
 26 Marshal Anderson failed to "ensur[e] that all inmates and detainees are provided with adequate
 27 medical care," did nothing to address Plaintiff's bullet wound, and failed to provide Plaintiff care

1 after surgery. (*Id.* at 7-8). But Plaintiff makes these allegations against multiple defendants
2 without specifying what specific actions Marshal Anderson took.

3 Whether *Bivens* would authorize a claim for this scenario remains to be seen. But before
4 the Court even reaches that question, it must recommend dismissing Plaintiff's claims against
5 Marshal Anderson because Plaintiff has not pled any factual allegations against Marshal
6 Anderson to state any constitutional-violation theory against him. To be liable for a *Bivens* claim,
7 the *particular* defendant himself must have personally violated the plaintiff's constitutional
8 rights. *Ziglar*, 137 S. Ct. at 1860 (holding that "*Bivens* is not designed to hold officers
9 responsible for acts of their subordinates"). Here, Plaintiff alleges no facts mentioning Marshal
10 Anderson. Plaintiff has therefore not alleged facts to state a colorable *Bivens* claim against him.
11 Although it appears very unlikely that Plaintiff will be able to state a colorable claim against
12 Marshal Anderson, the Court recommends giving Plaintiff leave to amend the claims against him.

13 If Plaintiff chooses to amend his claims against Marshal Anderson, Plaintiff's amended
14 complaint must allege true facts sufficient to state a colorable *Bivens* claim against each
15 *particular* defendant. General, collective, or conclusory allegations will not be sufficient.
16 Furthermore, Marshal Anderson may not be held vicariously liable for a *Bivens* claim merely
17 because of the position he holds. If there is an alternative remedial scheme available, Plaintiff is
18 challenging a policy, or Plaintiff seeks injunctive relief, Plaintiff will not be able to state a
19 colorable *Bivens* claim. See *Solida v. McKelvey*, 820 F.3d 1090, 1093 (9th Cir. 2016) (holding
20 that a *Bivens* action is inappropriate for claims seeking solely equitable relief against actions by
21 the federal government and explaining that *Bivens* suits are individual capacity suits and thus
22 cannot enjoin official government action).

23 If Plaintiff chooses to amend the complaint, Plaintiff is informed that the Court cannot
24 refer to a prior pleading (i.e., the original complaint) to make the amended complaint complete.
25 This is because, generally, an amended complaint supersedes the original complaint. Local Rule
26 15-1(a) requires that an amended complaint be complete without reference to any prior pleading.
27 Once a plaintiff files an amended complaint, the original complaint no longer serves any function
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1 in the case. Therefore, in an amended complaint, as in an original complaint, each claim and the
2 involvement of each Defendant must be sufficiently alleged.

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4 **ORDER**

5 **IT IS THEREFORE ORDERED** that Plaintiff's application to proceed *in forma*
6 *pauperis* (ECF No. 9) is **granted**. Plaintiff will **not** be required to pay an initial installment fee.
7 Nevertheless, the full filing fee will still be due, pursuant to 28 U.S.C. § 1915, as amended by the
8 Prison Litigation Reform Act. Plaintiff is permitted to maintain this action to conclusion without
9 the necessity of prepayment of fees or costs or the giving of security therefor.

10 **IT IS FURTHER ORDERED** that pursuant to 28 U.S.C. § 1915, as amended by the
11 Prison Litigation Reform Act, the Nevada Department of Corrections will forward payments from
12 the account of **Martell B. Bland, Inmate No. 47080048**, to the Clerk of the United States District
13 Court, District of Nevada, 20% of the preceding month's deposits (in months that the account
14 exceeds \$10.00) until the full \$350 filing fee has been paid for this action. The Clerk of Court is
15 kindly directed to send a copy of this order to the Finance Division of the Clerk's Office. The
16 Clerk of Court is also kindly directed to send a copy of this order to the attention of **Director of**
17 **Inmate Accounting c/o Warden's Office**, Nevada Southern Detention Center, 2190 East
18 Mesquite Ave., Pahrump, NV 89060.

19 **IT IS FURTHER ORDERD** that even if this action is dismissed, or is otherwise
20 unsuccessful, the full filing fee will still be due, pursuant to 28 U.S.C. § 1915, as amended by the
21 Prison Litigation Reform Act.

22 **IT IS FURTHER ORDERED** that the Clerk of Court is kindly directed to file Plaintiff's
23 complaint (ECF No. 1-1) on the docket but shall not issue summons.

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25 **REPORT AND RECOMMENDATION**

26 **IT IS THEREFORE RECOMMENDED** that Plaintiff's claims against the United
27 States Marshals Service; Correction Corporation of America; CoreCivic, Inc.; Damon T.
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1 Hininger; Nevada Southern Detention Center; A. Thornton; J. Peterson; and Mr. Silva be
2 **dismissed without leave to amend** because amendment would be futile.

3 **IT IS FURTHER RECOMMENDED** that Plaintiff's claims against Marshal Theo
4 Anderson be **dismissed with leave to amend**.

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6 **NOTICE**

7 Pursuant to Local Rule IB 3-2 any objection to this Report and Recommendation must be
8 in writing and filed with the Clerk of the Court within fourteen (14) days after service of this
9 Notice. The Supreme Court has held that the courts of appeal may determine that an appeal has
10 been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474
11 U.S. 140, 142 (1985) *reh'g denied*, 474 U.S. 1111 (1986). The Ninth Circuit has also held that
12 (1) failure to file objections within the specified time and (2) failure to properly address and brief
13 the objectionable issues waives the right to appeal the District Court's order and/or appeal factual
14 issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991);
15 *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

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DATED: May 3, 2023



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19 DANIEL J. ALBRECHTS
20 UNITED STATES MAGISTRATE JUDGE
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